No. 84-902

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

WARDAIR CANADA, INC.,
Appellant,

v.

FLORIDA DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court of Florida

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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QUESTIONS PRESENTED

1. Whether a state excise tax on aviation fuel purchased by foreign airlines is preempted by federal law.

2. Whether a state tax that has not been affirmatively preempted by Congress or the Executive Branch, and is also non-discriminatory, fairly apportioned, and not likely to result in multiple taxation, should be invalidated on the ground that it prevents the federal government from speaking "with one voice" regarding foreign commerce.

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Pursuant to Rule 36 of the Rules of this Court, *amici* respectfully move this Court for leave to file the attached brief *amicus curiae* in support of appellee.*

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* Appellee has consented to the filing of this brief. Appellant has not.

The *amici*, organizations whose members include state, county, and municipal governments and their officials throughout the United States, have a vital interest in legal issues that affect state and local governments.

This case concerns a state excise tax on fuel purchased by foreign airlines, which provides a crucial source of revenue for the States during these times of fiscal crisis. The Florida Supreme Court upheld the tax against various challenges by both foreign and domestic airlines. Although this case directly involves only the validity of Florida's tax as applied to one airline based in Canada, the Court's decision in this case will affect pending cases involving the application of Florida's tax to eighteen other airlines from thirteen other foreign countries. The validity of similar taxes currently imposed by at least two other States—Illinois and New York—is also implicated.

The Florida Supreme Court held that the tax was not preempted by a bilateral aviation agreement between the United States and Canada because the agreement provides an exemption only from national customs, duties, and excise taxes. The contrary view—that the agreement impliedly preempts a state excise tax on aviation fuel—distorts this Court's preemption jurisprudence and severely intrudes on the powers and prerogatives of the States. In the absence of express preemption, this Court has appropriately insisted upon evidence of a congressional intent to occupy the field or an actual conflict between state and federal law. These concerns are particularly important in the determination whether state taxes are preempted because the state exercises a fundamental power when it imposes taxes. In our view, the federal government's admission, as *amicus curiae* in this Court, that neither federal statutes nor international agreements by their terms preclude the imposition of state taxes on aviation fuel should be conclusive of the absence of any preemption.

The Florida Supreme Court also held that the tax did not intrude upon the federal government's exclusive control over foreign affairs. In the absence of preemption, this Court should be extremely wary of limiting a state's power to tax because of the tax's alleged effect on foreign affairs. Both Congress and the Executive Branch have had considerable time and opportunities to act to preempt state excise taxes on aviation fuel purchased by foreign airlines, and neither has done so. On the basis of commitments to use "best efforts" to preclude state taxes, and in response to complaints by foreign governments about those taxes, the Executive Branch has done nothing but submit a brief to this Court; and that only in response to a request from the Court. *Amici* are very concerned that this approach to foreign relations will cut too deeply and erratically into the States' taxing power. Such approach also has the potential to eviscerate Congress' legitimate shared role in foreign relations and its role in protecting fundamental state interests. This case is not one of those rare occasions in which the Court should invalidate a state tax on the grounds of its effect on foreign affairs.

Amici submit that the Florida Supreme Court's decision is correct. Because a reversal of that decision will have a direct and immediate adverse effect on matters of compelling importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*

The interest of *amici* is set out in the motion accompanying this brief.

STATEMENT

Appellant, a Canadian airline, brought this action seeking an exemption from a Florida excise tax [1] on aviation

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[1] The Florida statute and the Florida Supreme Court describe the tax as an excise tax. Fla. Stat. Ann. § 206.42; App. A14. The tax also resembles a sales tax. Although the tax is collected from the dealer of aviation fuel and is "imposed for the privilege of the sale

fuel. Although appellant had been previously subject to a lesser tax on aviation fuel, appellant challenged the tax imposed by the legislature in 1983 on the ground that it violated both the Foreign Commerce Clause and the Supremacy Clause. Appellant obtained relief in the Florida Circuit Court, but the Florida Supreme Court reversed. In this Court, appellant contends: (1) that the state tax is preempted by federal legislation and international agreements, and (2) that, in any event, the tax impermissibly intrudes into the federal government's exclusive control over foreign affairs.

The facts are straightforward. Prior to April 1, 1983, Florida imposed an excise tax on fuel purchased by common carriers, such as railroads, shipping lines, and airlines, that was prorated on the basis of the proportion of each carrier's travel in Florida compared to its travel worldwide. *See Tropical Shipping & Construction Co. v. Askew*, 360 So. 2d 433 (Fla. 1978). Presumably because foreign airlines paid little or no Florida tax under this formula, they raised no complaints about the validity of the tax.

The 1983 amendment to the excise tax repealed the mileage proration formula for airlines. Fla. Stat. Ann. § 212.08(4); App. A43. As a result of the amendment, airlines paid a tax of 5 percent on a deemed price of $1.148 for each gallon of fuel purchased in Florida.[2] All airlines buying fuel in Florida thus felt an equal tax

at retail in [Florida]," the "levy of tax is upon the ultimate retail consumer" and the dealer "act[s] as agent for the state." Fla. Stat. Ann. § 212.70. For present purposes, however, the distinction between sales taxes and excise taxes is irrelevant. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 616 (1981).

[2] The statute has since been amended again. The new amendment, effective July 1, 1985, provides that a tax of 5.7 cents per gallon applies to "aviation fuel sold in this state, or brought into this state for use." 1985 Fla. Laws 85-348 § 2. Because the amendment applies prospectively (*id.*, § 9), it does not affect this appeal, which involves tax liability from April 1, 1983, to July 1, 1985.

burden.[3] An airline purchasing fuel in Miami for a flight to the Bahamas sustained the same tax burden per gallon of fuel as an airline purchasing fuel in Miami for a flight to Atlanta or Tallahassee.

Prior to passage of the amendment, an official of the United States Department of State wrote to Florida officials noting that the State Department had already received questions from foreign governments about the Florida tax. The State Department "urge[d] [Florida to] exempt foreign air carriers from taxes levied in your jurisdiction on items for which the United States Government provides [such] an exemption." App. A83. The State Department reiterated the request after the amendment passed. App. A87. In neither of these letters did the Department of State suggest that Florida lacked the power to levy the tax or that the tax was inconsistent with federal legislation or international agreements. In addition, the State Department cited no concrete threats of retaliation from foreign governments.

Soon after the amendment was enacted, a number of foreign and domestic airlines brought lawsuits in the Florida courts challenging the constitutionality of the tax. These cases were all heard before the Circuit Court of the Second Judicial Circuit in and for Leon County. The circuit court, in its first decision, rejected the claim by domestic airlines that the tax violated the Interstate Commerce Clause and the Equal Protection Clause of the United States Constitution, as well as provisions of the Florida Constitution. *Delta Air Lines, Inc. v. State of Florida, Department of Revenue*, No. 83-761 (May 23, 1983). Next, the circuit court addressed a similar challenge to the tax by a group of foreign airlines that did

[3] In *Delta Air Lines, Inc. v. Department of Revenue*, App. A8, the Florida Supreme Court invalidated a provision of the state tax laws that provided a corporate tax credit, because the tax credit discriminated against interstate commerce. The court went on, however, to hold that the tax credit provisions were severable. Florida has not sought review of that ruling in this Court.

not include appellant. The court relied on its decision in *Delta Air Lines, supra,* to reject summarily the Equal Protection and Interstate Commerce Clause claims (*Lineas Aereas Costarricenses, S.A. v. State of Florida, Department of Revenue,* App. A26), but the court accepted the argument that the tax was invalid as applied to these foreign airlines, because such application was in conflict with international air transport agreements. App. A27-A35. Turning finally to appellant's case, the circuit court took the same position that it had in *Lineas Aereas, supra,* holding that the application of the tax to appellant was inconsistent with an international agreement between the United States and Canada. App. A21.

On appeal, the Florida Supreme Court reversed. App. A1. The court began its analysis by finding that the state's tax had not been preempted by the Nonscheduled Air Service Agreement, May 8, 1974, United States-Canada, art. XII, 25 U.S.T. 787, T.I.A.S. No. 7826 [hereinafter cited as U.S.-Canada Agreement]. More specifically, the court noted that "[t]he provisions in the agreement between the United States and Canada clearly express an intent to apply to only national taxes and duties." App. A5.

The court also rejected appellant's Foreign Commerce Clause challenge. The court relied on its affirmance of the circuit court's decision in the case brought by domestic carriers (App. A8), in holding that the state tax did not violate the four-prong test under the Interstate Commerce Clause outlined in *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977). Turning to the foreign commerce implications, the court held that the state tax did not run afoul of the two additional requirements articulated in *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979). App. A5. After reiterating that the U.S.-Canada Agreement did not provide foreign carriers with an exemption from state taxes, the court stated that it did "not believe this [tax] prevents our

federal government from speaking with one voice." App. A6. Two justices dissented from this result, arguing that "the individual states of this country are precluded by [international] agreements from taxing fuel used by foreign airlines." App. A7.

This Court noted probable jurisdiction on November 4, 1985.

SUMMARY OF ARGUMENT

This case involves a narrow constitutional challenge to the exercise of a fundamental state power: the power to tax the purchase of goods in the state. Unlike many taxes previously before this Court, the tax at issue here concededly rests upon an adequate nexus with the State; is non-discriminatory, fairly apportioned, and fairly related to services provided by the state; and presents no threat of multiple taxation. The challenge mounted by appellant thus rests upon two, and only two, grounds: first, that the tax is preempted by federal legislation and international agreements; and, second, that the State's exercise of its taxing power has impermissibly intruded upon the federal government's exclusive power over foreign affairs. Neither contention is persuasive.

1. Florida's tax on aviation fuel is not preempted by the Federal Aviation Act, 49 U.S.C. §§ 1301-1557. Under this Court's tests for determining whether Congress has preempted a state law, *see Silkwood v. Kerr-McGee Corp.,* 104 S. Ct. 615, 621 (1984), the party urging preemption must expose an inconsistency between the intent of Congress and the effect of the state law. Appellant offers no evidence that Congress intended the Federal Aviation Act to have any effect on state taxation of aviation fuel. Indeed, the Act expresses an intent to permit state taxes like Florida's.

Nor is Florida's tax preempted by an international agreement between Canada and the United States. Both of the international agreements cited by appellant were specifically intended not to override state taxes, such as Florida's, and thus obviously do not preempt them. *See*

Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., 105 S. Ct. 2371, 2375 (1985). Moreover, the State Department, which was a party to those agreements, concedes that neither preempts Florida's tax. That concession alone should be dispositive. *See id.* at 2376.

2. Having survived a challenge based on actual preemption, the Florida tax should not be struck down because of speculation that it interferes with the ability of the federal government "to speak with one voice" regarding foreign commerce. In marking out the permissible line between state taxing power and the dormant federal power over commerce, the Court should give wide latitude to state taxes that are non-discriminatory and fairly apportioned, and that could not result in multiple taxation. In particular, the Judicial Branch should be reluctant to impose an essentially standardless judgment regarding the impact of a state tax on foreign commerce, particularly when, as here, the coordinate branches have not preempted the tax despite a clear opportunity to do so. In such circumstances, the Court should apply a strong presumption that an otherwise valid state tax can coexist with the dominant federal power over foreign commerce. No showing has been made in this case to overcome the presumption.

ARGUMENT

We begin with a straightforward proposition: the power to tax is of virtually unique importance to the States. Indeed, for over two centuries, this power has been recognized as a fundamental aspect of state sovereignty. For example, as part of the debate over ratifying the Constitution, Alexander Hamilton wrote in *The Federalist* No. 32, at 197-98 (Rossiter ed. 1961), that "the individual States should possess an independent and uncontrollable authority to raise their own revenues." He went on to note that, with the exception of duties on imports and exports, States "retain [the authority to tax] in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it would be a violent assumption of power,

unwarranted by any article or clause of its Constitution." *Id.* at 198.

Notwithstanding these strong sentiments, it is by now well-established that the state power to tax is necessarily subordinate to particular powers of the National Government. Nevertheless, the Court has repeatedly stressed the importance of this state power, even when balanced against Commerce Clause limitations. *See, e.g., Container Corp. v. Franchise Tax Board*, 103 S. Ct. 2933, 2955 (1983); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 616 (1981). Moreover, the excise tax challenged here is not a new or novel exercise of the taxing power: States have traditionally levied this sort of excise tax on goods purchased within their borders. *See, e.g., United Air Lines, Inc. v. Mahin*, 410 U.S. 623 (1973); *Nashville, C. & St. L. Ry. v. Wallace*, 288 U.S. 249 (1933).

In seeking to set aside Florida's tax, appellant raises two distinct, though related, claims. First, it argues that the federal government has affirmatively preempted the tax. As we discuss below, however, nothing cited by appellant comes close to the sort of clear indication of an intent to preempt that this Court has required before striking down otherwise valid state action. Second, appellant contends that, even if the tax has not been preempted, this Court must declare that it interferes impermissibly with the power of the federal government "to speak with one voice" regarding foreign commerce. As we further discuss, appellant has not shown the unusual threat to federal authority that would justify setting aside the state taxing power under this largely speculative standard.

I. NEITHER CONGRESS NOR THE EXECUTIVE BRANCH HAS AFFIRMATIVELY PREEMPTED STATE POWER TO IMPOSE EXCISE TAXES ON AVIATION FUEL.

To support its arguments regarding preemption, appellant has touched upon a variety of materials ranging from the general provisions of the Federal Aviation Act

to highly specific, though inapposite, provisions of an international agreement between the United States and Canada. None of these provisions preempts the tax at issue here.

A. The Federal Aviation Act Does Not Preempt Florida's Tax.

This Court in the past several years has had repeated occasions on which to articulate the standards governing preemption of state legislation. As the Court has made clear, each of the different formulations is a variation on the inquiry into whether Congress intended to override the specific state law in question. *See Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152 (1982). Of course, Congress can expressly preempt state law in areas of national concern. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). In addition, "[i]f Congress evidences an intent to occupy a given field, any state law falling within that field is preempted." *Silkwood, supra*, 104 S. Ct. at 621. Finally, a state law is preempted "to the extent it actually conflicts with federal law," or "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Ibid.*

Appellant concedes that the Federal Aviation Act, 49 U.S.C. §§ 1301-1557, does not expressly preempt the Florida tax on aviation fuel. It thus begins its preemption analysis at the second stage, contending that the act instead expresses a congressional intention to occupy the field of aviation regulation. The problem with this argument, however, is that it fails to consider two important preemption principles. First, this Court has repeatedly held that, in the absence of express preemption, Congress must express an intent to occupy the *specific* field covered by the challenged state law. *See, e.g., Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 103 S. Ct. 1713, 1726-27 (1983); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947). Second, the Court has indicated

that such an intention must be especially explicit in order to overcome the "presumption" that the exercise of a fundamental state power "can constitutionally coexist with federal regulation," *Hillsborough County, supra*, 105 S. Ct. at 2376.

The Court's decision in *Silkwood, supra*, 104 S.Ct. at 622-24, provides a good example of these principles. There, the Court held that federal statutes governing nuclear energy did not preempt state law allowing the award of punitive damages for tort law violations by nuclear facilities. Although it was beyond dispute that the federal government had taken a primary and extensive role in the regulation of nuclear energy, such extensive federal regulation did not mean that all state laws having an incidental connection with nuclear energy were preempted. Instead, the Court in *Silkwood* examined whether there was evidence in the statute or legislative history that Congress meant to occupy the area of remedies for nuclear energy accidents. The Court found no explicit evidence of such intent. *Ibid.*

Applying those principles to this case, we concede at the outset that Congress has taken an extensive role in the regulation of aviation. But appellant has shown no intention on the part of Congress to occupy the field of state taxation of aviation fuel. To the contrary, when the Act addresses the subject of state taxes affecting aviation, it indicates a congressional intention to permit state taxes like Florida's. *See* 49 U.S.C. § 1513. As this Court has observed, Congress chose expressly to preempt "a limited number of state taxes" in seection 1513(a), and to distinguish other state taxes "reserved in § 1513(b)." *Aloha Airlines, Inc. v. Director of Taxation*, 104 S. Ct. 291, 294 n.6 (1983). Thus, section 1513(a) prohibits the States from levying any tax "on persons traveling in air commerce or on the carriage of persons traveling in air commerce." The Court has indicated that Congress intended by this provision to forbid the States from levying taxes focused on airline passengers, such as head taxes

and gross receipts taxes. *See* 104 S. Ct. at 294-95 (discussing legislative history). Section 1513(b), by contrast, expressly permits the States to impose other taxes to be paid by air carriers (*id.* at 294 n.6), by allowing "property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services." 49 U.S.C. § 1513(b). Florida's excise tax on aviation fuel clearly falls within this latter category.

Appellant cites nothing of comparable clarity to support its position. Indeed, when describing the scope of the federal exercise of power under the Act, appellant mentions "licensing, route services and other air services, rates and fares, tariffs, competition, [and] safety" (Appellant's Brief 37), but not state taxes on fuel. Nor do the provisions that apply specifically to foreign air carriers expressly occupy the field of state taxation. Although appellant places much emphasis on the fact that the Act requires foreign airlines to have a federal permit (*see* 49 U.S.C. § 1372), these permit procedures focus solely on the qualifications of the foreign carrier itself, not on the carrier's obligations under state law. Similarly, although appellant points out that Congress had delegated to the Department of State the power to negotiate air transport agreements with foreign nations (*see* 49 U.S.C. §§ 1462, 1502),[4] the mere delegation of authority to act, and by such actions to preempt, is not equivalent to a congressional intent to preempt. *See Hillsborough County, supra.*

Appellant is no more convincing in its submission that the state tax is in direct conflict with the Act. Although appellant raises the problem of a conflict in general terms, it fails to point to a single provision of the Act that actually conflicts with Florida's tax. This Court has stated that, in order for the requisite conflict to exist, it must be

[4] These provisions may simply qualify the Executive's authority to enter into binding international agreements by requiring the Department of State to consult with the Department of Transportation. 49 U.S.C. §§ 1462, 1502(b).

impossible for someone to follow the provisions of both federal and state law. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). Appellant has not suggested any way in which it is unable to satisfy the provisions of the Act if it pays the Florida tax.

Finally, contrary to appellant's position, the state tax does not stand as an obstacle to any of the Act's purposes. As this Court has recently made clear, this standard also requires a specific inconsistency between federal and state law. For example, in *Silkwood, supra*, 104 S. Ct. at 621, the Court cited *Hines v. Davidowitz*, 312 U.S. 52 (1941), as a case illustrating how a state law can stand as an obstacle to a federal statute. The Court in *Hines* held that the federal Alien Registration Act preempted a state alien registration act. The Court began by noting the federal power "to restrict, limit, regulate, and register aliens" (*id.* at 68), but did not find preemption on this ground. Rather, the Court held that the state law could not stand because Congress intended the federal statute to provide the sole standard for such restrictions on aliens, and the state statute provided an inconsistent standard. There is no comparable inconsistency between federal and state law here, and thus no interference with federal objectives.

B. Florida's Tax Is Not Preempted by International Agreements Between the United States and Canada.

The extent of the Executive's authority to enter into international agreements that bind the United States, and by extension override state law, has by no means been clearly drawn by this Court. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654 (1981); L. Henkin, *Foreign Affairs and the Constitution*, 173-88 (1972). In this case, however, the Court need not assess the inherent authority of the Executive to act in this sphere because, as noted above, Congress has expressly delegated to the Executive the power to enter into international agreements concerning air transportation. 49 U.S.C. §§ 1462, 1502. At the same

time, the Court need not address whether that delegation includes the authority to preempt state tax laws, because it is clear that the international agreements cited by appellant do not bar Florida from taxing aviation fuel sold to appellant within the State. No matter which preemption standard the Court looks to, Florida's tax is not preempted, because the agreements themselves recognize the validity of such taxes. A federal rule that exempts a state law obviously does not preempt it. *See Hillsborough County, supra*, 105 S. Ct. at 2375-76.

Appellant places great reliance in its brief on the provisions of the U.S.-Canada Agreement, *supra*, arguing that the Agreement by its terms was intended to foreclose state taxing power.[5] The language of the Agreement, however, betrays that position. The Agreement—like many international agreements in this area[6]—limits itself to exempting foreign air carriers, such as appellant, from "*national* duties and charges" on aviation fuel. App. A58 (emphasis added). Indeed, the use in the Agreement of the word "national" is strong evidence that state taxes were *not* intended to be covered, given the existence of other agreements in the air transportation area that do distinguish between state taxes and national taxes.[7] We

[5] An international agreement addresses only the relations between the contracting parties. Thus, a single international agreement cannot preempt a state law as applied to all foreign carriers engaged in commerce in the state but at most as applied to those carriers engaged in commerce between the state and the foreign contracting nation.

[6] *See, e.g.*, Air Transport Services Agreement, Aug. 15, 1960, United States-Mexico, art. 7, 25 U.S.T. 65; Air Transport Services Agreement, Jan. 8, 1947, United States-Ecuador, art. 3(b), 61 Stat. 2775.

[7] As noted in the federal government's brief, a number of international agreements in this area bar national taxes while obligating the Executive to use its "best efforts" to secure exemptions for foreign carriers from state and local taxes on aviation fuel. U.S. Brief on Appeal 16-17.

Even these best-efforts provisions, however, cannot fairly be read to preempt state tax laws. The provisions are not self-executing

note that, in *Container Corp., supra*, 103 S.Ct. at 2956, the Court relied on this same distinction in holding that an international agreement did not preempt the tax challenged in that case.[8]

This interpretation is supported by that given to the Agreement by both the Canadian government and the State Department. For its part, Canada allows its own

and thus cannot be said by themselves to preempt state law. More important, undertaking an obligation to use "best efforts" to effect a result is an admission that the result is not already effected. Thus, these best efforts provisions simply oblige the Executive to take reasonable steps in opposition to such laws—for example, the sending of notes to taxing authorities. Both the Department of State and various foreign governments have interpreted these provisions this way. In the State Department's letters to Florida, the Executive never stated that the state lacked the power to tax in light of any international agreement. *See* App. A82-A83, A87. And although the diplomatic notes from foreign governments included in the appendix to the federal government's brief encourage the State Department to oppose Florida's tax, only a few suggest that the tax is in fact preempted by international agreement. U.S. Brief on Appeal 22, 1a-58a. It is not clear why the State Department thought that sending notes to Florida was likely to be more effective than legislation or international agreements under 49 U.S.C. §§ 1462, 1502.

Amici also submit that none of these agreements other than the U.S.-Canada Agreement governs whether Florida's tax as applied to appellant is preempted, nor is the potential preemptive effect of these other agreements on Florida's tax as applied to other foreign carriers doing business in Florida an issue in this case. It may be that certain of the international agreements are more susceptible to an interpretation that they preempt state law because they do not contain language limiting the exemption from taxation. The Court, however, should address each preemption case on its own merits. *See Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 n.12 (1982). Moreover, if the absence of limiting language is relevant to the preemptive effect of these other agreements, the presence of such language is surely relevant to nonpreemption in this case.

[8] In addition, Congress was aware of state taxation affecting air carriers in 1973—prior to the signing of the U.S.-Canada Agreement—when it preserved state power to tax the sale of goods and services to air carriers. *See* 49 U.S.C. § 1513(b).

provinces to tax the aviation fuel of American air carriers. U.S. Brief on Appeal 13. Not surprisingly, therefore, the record reveals no evidence that Canada has made any complaints about Florida's tax. It has neither sent a diplomatic note nor presented its views in this litigation. Similarly, the State Department, whose views are presented in the federal government's brief, concedes that the U.S.-Canada Agreement does not preempt Florida's tax. U.S. Brief on Appeal 17. The Court has suggested that such an interpretation by the agency delegated by Congress with the authority to preempt state law is usually dispositive. *See Hillsborough County, supra*, 105 S. Ct. at 2376; *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982); Restatement (Second) of Foreign Relations Law of the United States § 152 (1965).

We also note that the question of preemption must be viewed even more critically when it is a federal agency, rather than Congress, that is said to have acted to preempt. In *Hillsborough County, supra*, 105 S. Ct. at 2379, the Court indicated that, under such circumstances, the intent to preempt must be even more specific. There, the Court noted that the Federal Drug Administration had the ability to make its intentions clear and "[could] be expected to monitor, on a continuing basis" the relationship between federal obligations and state law. *Ibid.* The Department of State, of course, occupies a similar position in the field of foreign affairs. In short, the State Department was aware of state taxes on aviation fuel and, we assume *arguendo*, could have and still can preempt them explicitly in an international agreement.

Nor does the Florida tax conflict in any way with the Chicago Convention on International Civil Aviation, *opened for signature*, Dec. 7, 1944, 61 Stat. 1180. As appellant must concede, the Convention only addresses state and local taxes on fuel carried into the United States, not fuel purchased here. 61 Stat. at 1186. Indeed, like the U.S.-Canada Agreement, the provisions of the Convention by negative implication support Florida's

power to tax. Its terms confirm that the international community has long been aware of the burden of state and local taxes, and that the parties contracting international agreements know how to include a provision expressly preempting such taxes if they desire to do so.

Finally, appellant cites the resolutions of the International Civil Aviation Organization (ICAO), which was established by the Chicago Convention, as authority for preemption. Even if those resolutions do reveal an international interest in exempting foreign airlines from state and local taxes,[9] this Court has never suggested that the statement of an interest in a broad, unsigned resolution preempts state law. The resolutions of the ICAO are not a source of federal law that can override state law under the Supremacy Clause. *See* L. Henkin, *supra*, at 194-95; *see also* Restatement, *supra*, §§ 130-31 (discussing treaties and international agreements).[10] Indeed, the State Department in its brief indicates that the ICAO did not intend the resolution to be a source of law. U.S. Brief on Appeal 11-13. Moreover, the expression of international concern about state taxes as early as 1966 again cuts against appellant's argument, by revealing that the United States and Canada could have expressly ad-

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[9] One resolution covers taxes levied "by any taxing authority within a State." The term "State" in the resolution in fact refers to contracting nations. Thus, it remains a question of interpretation whether Florida is a "taxing authority within" the United States. Even if it is, however, the resolution does not support appellant's argument, because the resolution only provides for reciprocity between nations. As noted above, there is currently taxing reciprocity between the United States and Canada.

[10] Both appellant and the federal government rely in part on the fact that most nations prohibit local taxes on aviation fuel. This Court, however, has indicated that international practice does not play a decisive role in its assessment of a state tax under the Foreign Commerce Clause. *See Container Corp., supra*, 103 S. Ct. at 2956-57; *Japan Line, supra*, 441 U.S. at 442-43. Furthermore, Canada, the only foreign nation directly implicated in this case, permits local taxes on aviation fuel.

dressed the issue of state taxes in the later U.S.-Canada Agreement if they had intended to prohibit such taxes.

The cases relied upon by appellant add nothing to its argument. In both *United States v. Pink*, 315 U.S. 203 (1942), and *United States v. Belmont*, 301 U.S. 324 (1937), this Court held only that state law could not be applied in light of an international agreement between the United States and the Soviet Union. The cases simply confirm the abstract proposition that an international agreement can preempt state law. Both cases involved refusals by state courts to recognize decisions by a foreign government that the Executive had agreed to recognize, creating a specific conflict between the state law rule and the international agreement. More to the point here, however, are the repeated statements by this Court that a treaty or international agreement does not override a state law unless that intention is clearly stated. *See Guaranty Trust Co. v. United States*, 304 U.S. 126, 143 (1938). None of the materials relied on by appellant provides such a clear displacement of Florida's excise tax on aviation fuel.

II. THE FLORIDA TAX DOES NOT IMPERMISSIBLY INTERFERE WITH THE POWER OF THE FEDERAL GOVERNMENT TO SPEAK WITH ONE VOICE REGARDING FOREIGN COMMERCE.

Because the federal government has not affirmatively preempted the Florida excise tax, the remaining question is whether this Court should hold that the tax nonetheless interferes with the federal power to speak with one voice regarding foreign commerce. We submit that it should not, for several reasons.

First, we believe that the decisions of this Court, in both the interstate and foreign commerce areas, have correctly moved away from efforts to invalidate state laws on the general ground that they interfere with uniform federal treatment. Rather, the Court has recognized that state taxes are to be presumed valid unless they

involve more concrete forms of intrusion upon commerce, such as discrimination, improper apportionment, or, in the case of foreign commerce, multiple taxation. Second, we submit that the courts are generally in a poor position to decide whether a state tax does, in fact, so hobble federal power that it cannot compatibly survive. Because Congress and the Executive Branch have unquestioned power to preempt those taxes truly deemed burdensome, the courts should be reluctant to override state sovereignty in the absence of the clearest sort of showing of improper intrusion. Finally, we think that the evidence of obstruction in this case is particularly thin. Neither appellant nor the United States as *amicus curiae* has demonstrated the type of risk to the conduct of foreign affairs that would justify striking down a state tax that Congress and the Executive Branch have not chosen to preempt.

A. The Uniformity Principle is Not the Touchstone for the Validity of State Taxes Under the Interstate and Foreign Commerce Clauses.

The attempt to limit state powers based upon an asserted need for uniform federal treatment is hardly an unusual one. This Court has long recognized that, under the Interstate and Foreign Commerce Clauses, the regulation of such commerce is the exclusive domain of the federal government. Thus, the Court early on held that certain state laws were invalid because the needs of foreign or interstate commerce required a uniform federal rule, even though Congress had not already provided such a rule. *See, e.g., Henderson v. Mayor of City of New York*, 92 U.S. 259 (1875); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827). Nevertheless, as the Nation expanded and commerce developed, it became clear that too literal an application of the rule of uniformity would severely limit traditional state powers. Given the fact that most state legislation has some effect on interstate or foreign commerce, the Court has taken a more accommodating view toward the inevitable conflict between the ex-

clusive federal control over foreign and interstate commerce and the incidental effects of state law on such commerce.

The vagaries of this conflict are well illustrated in the cases addressing challenges to state taxes[11] based upon the Interstate Commerce Clause. The early cases in this area took the stern view that any intrusion into the federal sphere was an impermissible breach of the need for uniformity. *See, e.g., Brown v. Maryland, supra.* Later, however, the Court modified that broad prohibition, attempting instead to delineate standards that distinguished between impermissible taxes on commerce itself, *see, e.g., Helson v. Kentucky*, 279 U.S. 245 (1929), and permissible taxes on local actions, *see, e.g., Edelman v. Boeing Air Transport, Inc.*, 289 U.S. 249 (1933).[12] This dis-

[11] In *Northwestern States Portland Cement Co. v. State of Minnesota*, 358 U.S. 450, 457-58 (1959), the Court wrote:

> Commerce between the States having grown up like Topsy, the Congress meanwhile not having undertaken to regulate taxation of it, and the States having understandably persisted in their efforts to get some return for the substantial benefits they have afforded it, there is little wonder that there has been no end of cases testing out state tax levies. The resulting judicial application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation. This Court alone has handed down some three hundred full-dress opinions spread through slightly more than that number of our reports. As was said in *Miller Bros. Co. v. State of Maryland*, 1954, 347 U.S. 340, 344, the decisions have been "not always clear * * * consistent or reconcilable. A few have been specifically overruled, while others no longer fully represent the present state of the law."

[12] It was in these cases that the Court held that a state could not tax an "instrumentality of commerce" at all. *See Helson, supra.* Appellant argues that aviation fuel is an instrumentality of commerce. We do not argue this point, except to note the difficulty of determining why fuel is any more an "instrumentality of commerce," than, for example, the food served on board. *Amici* submit

tinction between direct and indirect taxes on commerce was defined in large part on the basis of the Court's case-by-case assessment of the need for uniform rules in interstate commerce. *See Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 448 (1960).

The boundary between direct and indirect burdens on commerce ultimately proved unsatisfactory. In more recent times, the Court has moved to abandon any bright line limiting the taxing power of the states based on the perceived need for federal uniformity in interstate commerce. Without reviewing this movement in detail, it is sufficient to note that the Court gradually evolved a four-part test that draws upon various principles identified in earlier cases but does not turn on the absence or presence of a need for uniformity *per se. See Complete Auto Transit, supra.* Thus, the Court in *Complete Auto Transit* held that a state tax does not violate the Interstate Commerce Clause if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." 430 U.S. at 279.

This four-part test, as presently applied by the Court, protects interstate commerce from certain measurable intrusions by state governments without subjecting state actions to the sort of judicial guesswork invited by the notion of federal "uniformity." The first factor merely echoes the due process limit on taxation: namely, that States must enjoy some minimum relationship with the

that, in any event, the question whether aviation fuel is an instrumentality of commerce is not controlling, because the Court has abandoned this standard for Commerce Clause analysis. Although *Japan Line, supra*, describes the shipping containers as instrumentalities of commerce, the description does not seem to have been intended the revive the constitutional significance that the term once had. The Court's discussion attributes no significance to the fact that the containers were instrumentalities of commerce; and the holding did not turn, even in part, on this fact.

entity or event to be taxed. *See Commonwealth Edison, supra*, 453 U.S. at 622-26. The second and third factors reflect the kind of quantifiable burdens that the Court has recognized as genuine threats to the federal system and the flow of interstate commerce. *See Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457 (1959). The apportionment standard, for example, prevents States from burdening commerce with multiple taxation (*see Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 746 (1978)), while the discrimination test guarantees that the effects of state taxes are felt without regard to state boundaries. *See Commonwealth Edison, supra*, 453 U.S. at 618-19. The courts can play an effective role in limiting these burdens on interstate commerce because the courts are actually better positioned than Congress to develop a record for determining whether a tax discriminates against interstate commerce or results in multiple taxation.

The Court has expressed a clear unwillingness, however, to go beyond these reasonably structured inquiries. For example, in *Commonwealth Edison, supra*, 453 U.S. at 628, the Court rejected the argument that it should use the fourth factor—whether a tax is fairly related to services provided by the state—to assess whether a state tax was so high as to offend the dominant federal power. In declining to undertake that review, the Court advised that Congress has the prime responsibility for determining which state taxes are "contrary to federal interest." Thus, in contrast to its active posture in assessing discrimination and the threat of multiple taxation, the Court has taken a more deferential view of state power in light of bare assertions of a paramount "federal interest."

The same course should be followed in the context of the Foreign Commerce Clause. As this Court indicated in *Japan Line, supra*, a case involving a Foreign Commerce Clause challenge to a California ad valorem property tax on shipping containers, the basic analysis under

the Foreign Commerce Clause tracks the four-prong inquiry used in the interstate context (*see Complete Auto Transit, supra*, 430 U.S. at 279). In addition, however, the Court identified two other factors that must be considered: "the enhanced risk of multiple taxation" in the international context (441 U.S. at 446), and the possibility that a state tax "may impair federal uniformity in an area where federal uniformity is essential" (*id.* at 448). Describing this uniformity principle, the Court quoted language from a recent decision interpreting the Import-Export Clause, noting "the Framers' overriding concern that 'the Federal Government must speak with one voice when regulating commercial relations with foreign governments.'" 441 U.S. at 449 (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)).

Although appellant and the United States appear to take this reference to a "one voice" standard as an endorsement of the sort of "uniformity" inquiry largely abandoned in interstate commerce cases, we think that view of the Court's recent cases to be considerably overstated. To begin with, in actually applying the "one voice" notion, the Court has recognized that the principal inquiry to be made is whether the federal government has chosen to mark out an area for uniform treatment through exercise of its powers of preemption. We have no quarrel with that view. Our point is simply that, when the federal government has not preempted state action, the courts should be hesitant to fashion their own version of preemption based solely on the idea of "one voice" over foreign commerce. The decision in *Japan Line* says nothing to the contrary on that issue.

We also note that the "one voice" standard suffers from the same central defect as the concept of "uniformity" in interstate commerce: it speaks to only one side of the balance at stake. As was the case in the field of interstate commerce, virtually any state tax affecting foreign commerce can be said to affect uniform federal treatment and thus, under a rigid application of the "one

voice" principle, be impermissible. But that analysis ultimately does nothing more than restate the essential question, which is whether the tax so interferes with the need for one dominant power that it cannot stand. The answer to that question depends upon a more sensitive balancing of the interests involved.[13]

This Court, in fact, recognized as much in *Container Corp., supra.* There, the Court stated that, even absent preemption, the uniformity principle would be violated if the state tax "implicates foreign policy issues which must be left to the federal government." 103 S. Ct. at 2955. At the same time, however, the Court expressly admonished that such foreign policy concerns had to be balanced against "the sovereign right of the United States as a whole to let the States tax as they please." *Ibid.* The Court in *Container Corp.* concluded that the balance in that case must be struck in favor of permitting the State to exercise its power.

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[13] Indeed, the origins of the "one voice" language show that it was never intended to serve by itself as a measure for this Court's assessment of state taxes under the Foreign Commerce Clause. In *Michelin Tire, supra,* the Court used that language to describe the purpose of the Import-Export Clause, which articulates an absolute limit on the States' power to have any taxes on import or exports. While the Import-Export Clause limits all taxes in a defined area, the Foreign Commerce Clause, like the Interstate Commerce Clause, does not provide such an inflexible limitation on state taxing power. *See The Federalist* No. 32, *supra.* Instead, under the Commerce Clauses, the Court must attempt to distinguish between those taxes that are permissible and those taxes that are not, even though both kinds of taxes have some effect on foreign or interstate commerce. *See Boston Stock Exchange v. State Tax Comm'n,* 429 U.S. 318, 328-29 (1977).

By the same token, this case must be distinguished from cases in which the States are attempting directly to participate in foreign affairs. *See, e.g., Zschernig v. Miller,* 389 U.S. 429 (1968). Such cases, like those involving the Import-Export Clause, do not involve striking a balance between state taxing power and the effect of a given state tax on foreign affairs, but turn on whether the State has acted in a defined area that is expressly reserved for federal control.

This Court has also acknowledged that the "one voice" doctrine, if applied as appellant urges, will unavoidably lead the courts into difficult and uncertain inquiries. Thus, the Court noted in *Container Corp., supra,* that it has no special competence "in determining precisely when foreign nations will be offended by particular acts, and . . . in deciding how to balance" foreign policy concerns against state taxing power. *Ibid.* The problem is made even more difficult when the issue arises, as it frequently will arise, in the context of garden-variety commercial litigation. In such cases, like this one, the foreign policy concerns of the United States will often be presented by a taxpayer simply seeking to evade a tax rather than by the United States at its own initiation. The line between private economic concerns and public foreign policy concerns may thus prove particularly troublesome to discern.

The process of identifying federal policy through litigation will also create needless uncertainty for state legislatures. As we have already noted, in the usual order of analysis, a court will be faced with the argument that a state tax conflicts with the "one voice" principle only after it has already decided that the tax is non-discriminatory, fairly apportioned, not likely to result in multiple taxation,[14] and, further, that it has not been preempted by Congress or by the Executive Branch. In such circumstances, we think that it will be the rare case where the impact of a tax is so harmful to federal foreign policy that it cannot coexist with that policy. Yet, because the "one voice" standard seems to carry the seeds of a presumption against taxes affecting foreign commerce, there is no way short of litigation for the legislature to tell with any certitude whether a particular tax is valid or not.

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[14] Although the apportionment factor in *Complete Auto Transit, supra,* protects against multiple taxation, *Japan Line, supra,* makes clear that the foreign context raises special concerns about multiple taxation, because of the courts' inability to review foreign taxes. In this case, of course, there is no risk of multiple taxation of the fuel purchased in Florida.

In our view, this tension between state taxing power and federal control over commerce is largely unnecessary. At bottom, the judgments about the latitude to be given state legislatures and the possible impact of their actions on foreign affairs are ones of policy: political choices about how much impact should be tolerated to allow full exercise of the States' sovereign powers. In the absence of clear evidence to the contrary, we submit that the Court should assume a willingness on the part of the federal government to tolerate state taxes meeting all other standards for legitimacy under the Interstate and Foreign Commerce Clauses. At the very least, the Court should require some indication why, if the tax truly does interfere with important federal policy, Congress or the Executive Branch has not taken steps to preempt it. Indeed, in this case, Congress has expressed an intention to tolerate state taxes, like Florida's, on the sale of goods and services to air carriers. *See* 49 U.S.C. § 1513(b).

The Court need not decide here when, if ever, the "one voice" standard by itself would be a satisfactory basis for striking down an otherwise valid state tax. For present purposes, it is enough simply to hold that a tax meeting all other standards under *Japan Line*, and not preempted by the federal government, carries with it a strong presumption of validity. As we discuss below, nothing in the record of this case approaches the sort of showing necessary to overcome that presumption.

B. Florida's Tax Should Not Be Invalidated on the Ground that It Impermissibly Interferes with Foreign Affairs.

Once the maze of different standards under the Foreign Commerce Clause has been negotiated, this case comes down to a narrow inquiry. Neither Congress nor the Executive has affirmatively preempted Florida's tax. See pages 7-16 *supra*. And appellant concedes, as it must, that this case does not involve a threat of discrimination or multiple taxation. The sole question thus is whether

Florida's tax is one of those rare taxes that so interferes with important federal policy that this Court should declare it unconstitutional.

Although appellant and the United States advance a series of different arguments for their position that the state tax does improperly interfere with dominant federal policy, many of these arguments depend upon the same materials cited to show preemption by Congress and the State Department. As we have already discussed, none of these materials makes it clear that federal policy requires the preclusion of state taxes on aviation fuel. In addition, however, appellant and the United States point to two other factors that, in their view, show an overriding federal interest in the invalidation of the Florida excise tax: the threat of retaliation and the position taken by the State Department before this Court. Neither of these factors should be held controlling.

1. *The threat of retaliation*

References to possible retaliation, as a ground for overturning a state tax, must be treated with some caution. First, the threat of retaliation may presumably be put forward in every case where a foreign government does not have a similar or equal tax. Thus, an argument based on possible retaliation does very little to separate taxes with acceptable effects on foreign commerce from those with unacceptable effects. Moreover, quite apart from the ubiquity of the concern, we think that even the *fact* of a retaliatory tax, as opposed to a mere threat, would not be sufficient to justify *automatic* invalidation of a state tax: Congress may believe that some additional tax on American companies abroad is a perfectly acceptable price to pay for respecting the States' sovereign power to tax at home.[15] The federal interest in interstate commerce is

[15] Although the Court in *Japan Line, supra*, invalidated a state tax, it did not rely on a finding that the tax was permissible in all respects save its encroachment upon the federal government's exclusive power over foreign affairs. The Court noted that the threat

not necessarily served by whatever policy results in the lowest rate of overall taxation.

We thus submit that mere threats of retaliation should be given little weight. If the threat is real and significant, Congress and the Executive Branch have the capacity to recognize it and, in addition, either to discourage it or accommodate it by statute or agreement. For the Judicial Branch, by contrast, the only choices are to ignore the threat or capitulate to it by invalidating the tax. In our view, the matter of dealing with retaliation is best left to other branches.

In any event, this case is hardly an attractive one in which to invalidate a state tax because of possible retaliation.[16] Retaliation is simply not a factor in this case. First, the record is devoid of evidence of any threat of retaliation by the Canadian Government. Although several foreign governments have presented the State Department with diplomatic notes, *see* U.S. Brief on Appeal 1a-58a, none was received from the Canadian government. Moreover, the State Department offers no evidence of any other kinds of foreign policy repercussions with Canada.

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of retaliation by foreign governments was a consideration in whether the State exceeded its taxing power (441 U.S. at 450); yet, the Court was concerned with the threat of retaliation that might result from multiple taxation. *Id.* at 452-55. The Court evidenced similar concerns in both *Container Corp., supra,* 103 S. Ct. at 2955-56, and *Mobil Oil Corp. v. Commissioner of Taxes of Vermont,* 445 U.S. 425, 446-49 (1980). This case, of course, poses no risk of multiple taxation.

[16] The federal government makes much of the fact that the Court in *Container Corp.* distinguished its holding sustaining a state tax from its decision in *Japan Line,* invalidating a state tax, in part, on the basis that *Container Corp.* involved a challenge by a domestic corporation while *Japan Line* involved a challenge by a foreign corporation. These cases should not, however, be read to provide an exception from state taxes for foreign corporations. Just as the Interstate Commerce Clause does not totally exempt domestic out-of-state corporations from state taxes, so, too, the Foreign Commerce Clause does not totally exempt foreign corporations.

Second, and perhaps most telling, some of the Canadian provinces themselves levy a similar tax. Thus, it is highly doubtful that the Canadian Government has any legitimate basis for a complaint about the Florida tax.[17]

2. *The submission of the United States*

The brief filed by the United States as *amicus curiae* in this Court presents somewhat different problems. Although the informed views of the State Department are not irrelevant (*see Container Corp., supra,* 103 S. Ct. at 2956), it would seem anomalous to uphold a state tax against a preemption challenge based on the formal actions by Congress and the Executive, only to strike it down based on a general statement of preference in a brief submitted to this Court. In our view, a federal policy articulated in a brief submitted at the invitation of this Court should typically be regarded as insufficient to override a state tax.

To begin with, we think that a requirement of more formal action carries with it a more fitting respect for state lawmaking. As we have said, the ultimate decision about state taxes in a case such as this is one of policy: a balancing of state power against federal interests in certain practices of trade. Although the federal government has the power to declare its interest dominant, it is essential to ensure that the policy decision to do so is made with sufficient formality and reflection. We note,

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[17] Moreover, *amici* submit that Florida's tax is valid as applied more generally. There is no compelling evidence in the record that any foreign government is going to retaliate in any way that poses serious foreign relations repercussions. Indeed, the diplomatic notes in the record contain few actual threats of any retaliatory action. Most simply request the State Department to oppose Florida's tax. There is almost no evidence about what these foreign governments will do if this Court upholds Florida's taxing power. A suggestion by this Court that Florida's tax appears to be valid generally may merely lead to an effort by the State Department and foreign governments that oppose the tax to enter into international agreements that directly address the relevant foreign policy concerns.

for example, that the views of the United States have not been part of this case at all, until this Court invited the Solicitor General to express those views. That last-minute intervention should not be the benchmark for determining whether state power can properly be exercised.

We also think a more formal process will allow for the proper interaction among the branches of the federal government. As the Court has made clear, the "nuances [of foreign policy] are much more the province of the Executive Branch and Congress than of this Court." *Container Corp., supra*, 103 S. Ct. at 2956. The primacy of formal action by the Executive and Congress, through international agreement or federal statute, preserves the important role that Congress plays in balancing the taxing power of the States against the foreign affairs power of the federal government. This congressional role has been acknowledged by all three branches of the federal government. The State Department admits in its brief that a possible conflict with state law is a factor in determining whether to proceed by international agreement, in which Congress plays no active role, or by treaty, which must be approved by the Senate. U.S. Brief on Appeal 18. Thus, Congress has decided to take a more formal role in the context of international agreements by enacting legislation that requires the Secretary of State to provide Congress with all such agreements. *See* 1 U.S.C. § 112b. This monitoring, in turn, gives Congress increased opportunities to react to international agreements that it finds inappropriate. And this Court has repeatedly noted the significance of the shared responsibilities of Congress and the Executive in foreign relations, *see Dames & Moore, supra*, as well as the role of Congress in guarding fundamental state interests, *see Garcia v. San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1005, 1017-20 (1975).[18]

[18] The Court's recent acceptance of agency regulations for the purposes of statutory interpretation provide an apt analogy. The Court has held that it will follow a reasonable regulation promulgated by the agency charged with the statute's enforcement. *See, e.g., Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 104 S.Ct. 2778, 2781-83 (1984). This acceptance is based in part on the recognition that Congress has delegated certain authority to the agency to fill in gaps in a statute by regulation. *Id.* at 2782. At the same time, the Court has never suggested that it would rely on the same principles in accepting an agency position evidenced solely by its brief before this Court.

We do not rule out the possibility that, in some cases, more formal action might be inappropriate or impractical. But this case is not one of them. To the contrary, the international agreements entered into by the Executive bear witness to its awareness of the state taxing power for decades. Despite that awareness, however, the Executive has repeatedly failed to take any action expressly to preempt those taxes. Nor has the State Department explained why any foreign policy problems could not be remedied through agreements that expressly preempt Florida's tax as applied to foreign commerce. *See* 49 U.S.C. §§ 1462, 1502. Finally, the State Department offered its views in the litigation challenging the tax only after the appeal was docketed in this Court and only after the Court expressly requested that the United States take a position. Even so, the Executive has made no mention of Congress' statement in the Federal Aviation Act, 49 U.S.C. § 1513(b), generally permitting state taxes like Florida's, an omission that confirms the difficulties inherent in relying too strongly on informal pronouncements by the Executive.

In short, this case presents no unusual circumstances that would justify invalidation of a state tax because of the effect of that tax on foreign policy. Although appellant plainly would prefer to keep the tax monies rather than pay them over to the State of Florida, a refusal to accede to that preference does not seriously interfere with the power of the federal government to regulate foreign commerce.

CONCLUSION

For the foregoing reasons, the judgment of the Florida Supreme Court should be affirmed.

Respectfully submitted,

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